



ATTORNEYS AT LAW

CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007-4492  
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

RICHARD BAR  
BRENDAN COLLINS  
STEVEN JOHN FELLMAN  
EDWARD D. GREENBERG  
KATHARINE FOSTER MEYER  
DAVID K. MONROE  
TROY A. ROLF  
DAVID P. STREET  
KEITH G. SWIRSKY  
THOMAS W. WILCOX

BRIAN J. HEISMAN  
JASON SETTY

ROBERT N. KHARASCH \*\*  
JOHN CRAIG WELLER \*\*

\*\* OF COUNSEL



**FILED**

OCT 9 - 2009

**SURFACE  
TRANSPORTATION BOARD**

MINNESOTA OFFICE  
700 TWELVE OAKS CENTER DRIVE, SUITE 204  
WAYZATA, MN 55391  
(T) 952/449-8817 (F) 952/449-0614

WRITER'S DIRECT E-MAIL ADDRESS  
TWILCOX@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER  
202-342-5468

October 9, 2009

**VIA HAND DELIVERY**

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E. Street, SW  
Washington, DC 20423

ENTERED  
Office of Proceedings

OCT 9 - 2009

Part of  
Public Record

**FEE RECEIVED**

OCT 9 - 2009

**SURFACE  
TRANSPORTATION BOARD**

**RE: STB Docket No. NOR 42116, U.S. Magnesium L.L.C. v.  
Union Pacific Railroad Company**

Dear Secretary Quinlan:

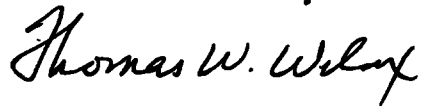
Enclosed for filing please find the original and ten (10) copies of the Public Version of the Complaint of U.S. Magnesium L.L.C. ("USM"). A check for \$350 is also attached to cover the filing fee required by 49 C.F.R. § 1002.2. An additional copy of the Complaint is included for date-stamping and return to the undersigned via messenger.

All material redacted from the Complaint is already known to the defendant Union Pacific Railroad Company ("UP"), the only other party in this case; consequently, UP is being served with the Confidential Version of the Complaint. Confidential material is contained in brackets [ ] in the Confidential Version, the original and ten (10) copies of which are being filed under seal with the Board today. An additional copy of the Confidential Version is also enclosed for date-stamping and return via our messenger.

Letter to Acting Secretary Quinlan  
October 9, 2009  
Page 2

Please contact me if you have any questions.

Very truly yours,

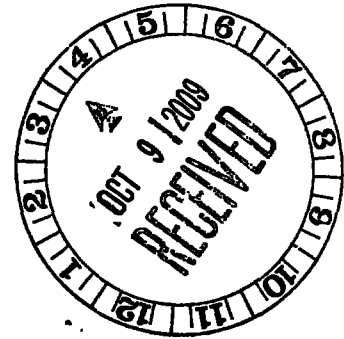
A handwritten signature in black ink that reads "Thomas W. Wilcox". The signature is written in a cursive, flowing style.

Thomas W. Wilcox  
*Counsel for U.S. Magnesium, LLC*

Enclosure

cc: J. Michael Hemmer, Esq.  
Dr. Howard Kaplan

BEFORE THE  
SURFACE TRANSPORTATION BOARD



US MAGNESIUM, L.L.C.  
238 North 2200 West  
Salt Lake City, UT 84116-2921

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY  
1400 Douglas Street  
Omaha, NE 68179

Defendant.

Docket No. NOR 42116

**FEE RECEIVED**

OCT 9 - 2009

**SURFACE  
TRANSPORTATION BOARD**

COMPLAINT

**FILED**

OCT 9 - 2009

**SURFACE  
TRANSPORTATION BOARD**

Thomas W. Wilcox  
David K. Monroe  
Jason M. Setty  
GKG Law, P.C.  
1054 Thirty-First Street, NW, Suite 200  
Washington, DC 20007  
Phone: 202.342.5248  
Fax: 202.342.5219

ENTERED  
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OCT 9 - 2009

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Public Record

Dated: October 9, 2009

US MAGNESIUM, L.L.C.  
238 North 2200 West  
Salt Lake City, UT 84116-2921

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY  
1400 Douglas Street  
Omaha, NE 68179

Defendant.

Docket No. NOR \_\_\_\_\_

COMES NOW Complainant, U.S. Magnesium, L.L.C. (“USM”), and files this Complaint with the Surface Transportation Board (“Board” or “STB”) against Defendant, Union Pacific Railroad Company (“UP”), pursuant to 49 U.S.C. §§ 10701, 10702, 10704, 10707, and 11704, and 49 C.F.R. Part 1111, seeking the establishment of reasonable railroad rates for the transportation of chlorine by UP from Rowley, Utah to rail destinations in Salt Lake City, Utah; Sparks, Nevada; Elk Grove, California; Stockton, California; and Pittsburg, California. As explained in more detail below, the common carrier rates for rail transportation to these destinations originally established in UP Tariff 4949, Item 1000, and most recently re-published in Item 1000-D (attached as Exhibit A) should be evaluated by the Board using the rate standards authorized by 49 U.S.C. § 10701(d)(3) and adopted by the Board in Ex Parte 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases*, (served Sept. 5, 2007) (“*Simplified Standards*”). USM

further requests that the Board evaluate the rates established for the issue movements under the Simplified Stand-Alone Cost (“SSAC”) methodology described in *Simplified Standards*.

In support hereof, USM states as follows:

### **IDENTITY OF THE PARTIES**

1. USM is a corporation organized under the laws of the State of Delaware with its principal place of business in Salt Lake City, Utah. USM specializes in the manufacture and supply of magnesium ingot products, magnesium recycling services, chemical by-products, and energy. USM is the only producer of primary magnesium in the United States, operating a manufacturing facility at Rowley, Utah on the Great Salt Lake, where magnesium has been produced by USM and its predecessors since 1972. USM’s operations in Rowley began with the 2002 purchase by USM of the assets of Magcorp and the ongoing magnesium business that Magcorp had established there.

2. USM’s magnesium production facility also produces a variety of co-products, which include chlorine, calcium chloride, iron chlorides, and hydrochloric acid. The co-product that is the subject of this Complaint is chlorine, which UP transports in rail tank cars supplied by USM. Chlorine is crucial to the health of millions of Americans due to its widespread use in water purification. In addition, chlorine is vital to the U.S. economy because it is used as a building block for many essential and diverse products used throughout the economy from plastics to pharmaceuticals. Chlorine is an essential and vital part of modern life.

3. UP is the nation’s largest railroad, and is a common carrier engaged in the common carriage of freight in interstate commerce. UP is subject to the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.*, and to the jurisdiction of this Board. UP provides the only feasible means of transporting chlorine from USM’s Rowley facility to

USM's customers at the issue destinations, and exerts sole control over the transportation rates charged to USM for this transportation.

#### DESCRIPTION OF THE ISSUE MOVEMENTS

4. The movements that are the subject of this complaint are from USM's Rowley, UT facility to the following rail destinations identified in Tariff 4949, Item 1000-D:

- a. Salt Lake City, UT
- b. Sparks, NV
- c. Elk Grove, CA
- d. Stockton, CA
- e. Pittsburg, CA

5. As required by 49 CFR § 1111.1(a), USM provides the following information regarding the issue movements:

- a. Information for all movements

|                                       |                                       |
|---------------------------------------|---------------------------------------|
| <b>Carrier identifier</b>             | Union Pacific Railroad Company ("UP") |
| <b>Type of shipment</b>               | UP single-line                        |
| <b>Type of car (URCS code)</b>        | Tank (URCS code 15)                   |
| <b>Car ownership</b>                  | Private                               |
| <b>Commodity type</b>                 | Chlorine, STCC 2812815                |
| <b>Weight of the shipment per car</b> | 90 tons                               |
| <b>Type of movement</b>               | Single-car load                       |

- b. Information for some of the shipments to Salt Lake City and Pittsburg<sup>1</sup>

|                                       |  |
|---------------------------------------|--|
| <b>Carrier identifier</b>             | Union Pacific Railroad Company ("UP")                              |
| <b>Type of shipment</b>               | UP origin with final delivery by connecting carrier at destination |
| <b>Type of car (URCS code)</b>        | Tank (URCS code 15)  |
| <b>Car ownership</b>                  | Private  |
| <b>Commodity type</b>                 | Chlorine, STCC 2812815   |
| <b>Weight of the shipment per car</b> | 90 tons  |
| <b>Type of movement</b>               | Single-car load  |

<sup>1</sup> Some shipments to Pittsburg and Salt Lake City would involve handling by a connecting carrier at destination resulting in minor changes in the estimated variable costs and R/VC ratios summarized in paragraph 16 below.

c. Information specific to each issue movement:

|                | One-way distance | Number of cars in 2008 | Number of cars expected in 2009 |
|----------------|------------------|------------------------|---------------------------------|
| Salt Lake City | 58.8 miles       | [ ]                    | [ ]                             |
| Sparks         | 529.3 miles      | [ ]                    | [ ]                             |
| Elk Grove      | 694.9 miles      | [ ]                    | [ ]                             |
| Stockton       | 727.4 miles      | [ ]                    | [ ]                             |
| Pittsburg      | 756.5 miles      | [ ]                    | [ ]                             |

### HISTORY OF THE CHALLENGED RATES

6. Prior to March 3, 2009 chlorine shipments from the Rowley facility to the five destinations listed in paragraph 4 were transported by UP pursuant to a rail transportation contract that was originally set to expire at the end of 2008 but was extended by mutual agreement of the parties to March 3, 2009 during the discussions summarized in the following paragraphs 7 and 8.

7. Beginning in early October, 2008 USM sought to engage UP in discussions to enter into a new rail transportation contract to replace the expiring contract. After initially not responding to USM's overtures, UP finally responded in January, 2009 by proposing to significantly increase the expiring contract rates to levels that were unacceptable to USM. UP refused all requests by USM to lower its proposed contract rate levels to these five destinations. Without acceptable contract rates and service terms, USM was forced to request common carrier tariff rates and service terms for rail service to the five destinations at issue in this case which USM did by a request dated January 16, 2009 made pursuant to 49 C.F.R. Part 1300.

8. UP established the requested tariff rates and service terms for shipments of chlorine to these five destinations and other rail destinations on January 26, 2009 in UP Tariff 4949, Item 1000. The rates went into effect on February 15, 2009, and USM began shipping

under them on March 3, 2009. Subsequently, UP re-published these rates without change several times, the most recent being July 20, 2009, in UP Tariff 4949, Item 1000-D. *See* Exhibit A.

9. The rates in UP Tariff 4949, Item 1000-D for the transportation of USM's chlorine from Rowley to the five destinations named in paragraph 4 are dramatically higher than the contract rates previously paid by USM in 2008 for this transportation, and are unreasonably high in violation of 49 U.S.C. §§10701 and 10702.

#### **UP'S MARKET DOMINANCE OVER THE TRANSPORTATION COVERED BY THE CHALLENGED RATES**

10. There is no feasible transportation alternative to UP rail service for the transportation of chlorine from Rowley to the five destinations covered by this Complaint. In accordance with 49 C.F.R. § 1111.1(a)(10), USM provides the following narrative describing the lack of feasible transportation alternatives:

11. There is no effective intramodal competition for rail transportation from the Rowley facility to any of the five destinations named in this Complaint. First, UP is the only railroad with physical access to the Rowley facility. More specifically, the Rowley facility is located on the western shore of the Great Salt Lake at the end of a 14-mile line of rail owned and operated by UP, which track connects to a UP main line track running east to west through Salt Lake City into Nevada and on to California. The closest connection to another railroad is to track owned by the BNSF Railway Company ("BNSF") located in Salt Lake City, approximately 60 miles south and east of the Rowley facility. BNSF has trackage rights over the UP east-west main line as a result of the Board's decisions in the UP/Southern Pacific Lines merger proceeding,<sup>2</sup> but these rights do not include the right to serve the Rowley facility, which was not

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<sup>2</sup> *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Transportation Company, St. Louis*



classified as a “2 to 1” facility under those decisions due to its captivity to UP prior to that merger.<sup>3</sup> Accordingly, establishing effective competition with UP through the establishment of physical access to BNSF at the Rowley facility via construction of a rail line from a connection with BNSF in Salt Lake City is not economically or operationally feasible. Second, the aforementioned trackage rights granted to BNSF over UP trackage as a condition of the Board’s approval of the UP/Southern Pacific Lines merger continue westward into Nevada and California, but they are also limited to overhead trackage rights only, meaning BNSF may not use them to serve industries located along the line except for specifically named “2-1” locations that do not include destinations covered by this Complaint.<sup>4</sup> Finally, while BNSF appears to have physical access to USM’s customer in Pittsburg, CA, BNSF’s inability to serve the Rowley facility prevents it from providing an effective alternative to UP for this movement.

UP’s market dominance over the five issue movements is also reflected in the fact that the challenged rates were established by UP from origin all the way to each destination, and USM deals only with UP on all aspects of the movements, even though on information and belief, USM understands that final delivery to USM’s customers in Pittsburg and Salt Lake City may occasionally be made by other railroads through switching arrangements they have with UP. However, such arrangements do not constitute effective competition under 49 U.S.C. §10707 and Board precedent. There are thus no railroad alternatives that effectively constrain UP’s pricing power over the transportation of chlorine from the Rowley, Utah facility to the five destinations in this Complaint.

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*Southwestern Railway Company, SPCSL Corporation, and the Denver and Rio Grande Western Railroad Company*, Docket 32760, 1 STB 233, 562 (1996) (“UP-SP Merger”).

<sup>3</sup> UP-SP Merger at 562 (1996).

<sup>4</sup> *Id.*

12. There is also no effective intermodal competition for the issue traffic. Intermodal competition with rail transportation from trucks does not exist for chlorine due to chlorine's status as a toxic by inhalation ("TIH") chemical.<sup>5</sup> Because rail is the safest mode for transporting chlorine, USM and its predecessors in interest have never shipped chlorine produced at the Rowley facility on their account using truck transportation, let alone shipped any chlorine to any of the five destinations covered by this Complaint by truck.<sup>6</sup> USM neither owns nor leases any trucks equipped to transport chlorine, and USM's infrastructure at Rowley is designed to facilitate the loading and movement of rail tank cars of chlorine produced by the plant. In addition to entailing unacceptable additional risk, switching from rail to truck transportation would entail significant capital expenditures, and would cause USM to forgo the benefits of the substantial investment it and its predecessors in interest have made in a rail-oriented plant infrastructure and USM's fleet of specialized chlorine rail tank cars. Lastly, numerous federal regulations affect the transportation of TIH commodities, and USM would have to reassess its operations to ensure compliance if USM were to consider using trucks as an alternative mode of transportation.

13. There is no waterway that could be used for barge transportation between Rowley and any of the five destinations. Similarly, there is no chlorine pipeline that could be used as a substitute for rail transportation.

14. Because there is no effective intramodal or intermodal competition for the issue traffic, UP has qualitative market dominance over the transportation of chlorine from Rowley,

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<sup>5</sup> See e.g. STB docket No. 42100, *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc.* (decision served June 30, 2008), at 3.

<sup>6</sup> On rare occasions of particular need, one USM customer located in the Salt Lake City, Utah area has dispatched one of its trucks to Rowley to pick up chlorine, but USM discourages this practice for safety and logistics reasons.

UT, to Salt Lake City, UT, Sparks, NV, Elk Grove, CA, Stockton, CA, and Pittsburg, CA. 49 U.S.C. § 10707.

### **ESTIMATED URCS PHASE III VARIABLE COSTS**

15. The common carrier transportation rates established by UP in Tariff 4949 for transportation of chlorine from Rowley, UT to the five destinations covered by this Complaint produce revenues substantially in excess of 180% of UP's variable costs<sup>7</sup> of providing the transportation to each of the destinations. Therefore, UP has quantitative market dominance over this rail transportation, as described in 49 U.S.C. § 10707(d).

16. Pursuant to *Simplified Standards*, slip op. at 25, and using the URCS inputs listed above in paragraphs 4 and 5, the following is USM's preliminary estimate of the URCS Phase III variable costs and the revenue-to-variable cost ratio for each movement that is covered by this Complaint:

|                       | <b>URCS Phase III<br/>variable costs</b> | <b>Tariff rate<br/>from UP 4949<br/>(per car)</b> | <b>R/VC ratio</b> |
|-----------------------|--|---|-------------------|
| <b>Salt Lake City</b> | \$630                                    | \$2,579   | 409%              |
| <b>Sparks</b>         | \$1,345                                  | \$6,034   | 449%              |
| <b>Elk Grove</b>      | \$1,608                                  | \$7,341   | 457%              |
| <b>Stockton</b>       | \$1,659                                  | \$7,679   | 463%              |
| <b>Pittsburg</b>      | \$1,762                                  | \$10,504  | 596%              |

17. Because UP possesses both qualitative and quantitative market dominance over the transportation of chlorine from Rowley, UT to the five rail destinations covered by this Complaint, the Board has jurisdiction over the reasonableness of the common carrier rates, rules and practices established by UP for this transportation. 49 U.S.C. § 10701(d)(1).

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<sup>7</sup> Variable costs include a "make whole" adjustment and are indexed to 2009 Q2 levels. Estimated variable costs for the switching arrangements with UP at Salt Lake City and Pittsburg have been included.

## **REQUESTED RELIEF**

18. The common carrier transportation rates established by UP in Tariff 4949, Item #1000-C for the rail transportation of chlorine from Rowley, UT to the five destinations covered by this Complaint are all unreasonable, unlawful, and exceed the maximum reasonable level permitted by 49 U.S.C. §§ 10701, 10704, and the *Simplified Standards*.

19. This Complaint encompasses any changes or successors to UP Tariff 4949, and all future iterations, issuances, or forms of common carrier tariffs, price documents, rates, charges, rules, and service terms applicable to the transportation by UP of chlorine from Rowley, UT to the five destinations listed herein.

20. The Board should order UP to establish reasonable rates and service terms for transportation of chlorine from Rowley, UT to the rail destinations identified as Salt Lake City, UT, Sparks, NV, Elk Grove, CA, Stockton, CA, and Pittsburg, CA in Tariff 4949, Item 1000-D. 49 U.S.C. § 10704. The Board should also order that reparations be paid, plus interest, for any unlawful charges assessed by UP from and after March 3, 2009. 49 U.S.C. § 11704.

## **CONCLUSION**

21. Neither this proceeding nor the granting of the relief requested will constitute a major federal action significantly affecting the quality of the human environment or the conservation of energy resources.

22. In accordance with 49 CFR § 1111.1(b), USM is today making mandatory disclosures to UP contemporaneous with the filing of this Complaint.

WHEREFORE, Complainant USM prays that Defendant Union Pacific Railroad Company be required to answer the charges herein; that this Complaint be assigned for hearing under 49 CFR Part 1111; and that, after due hearing and investigation, this Board:

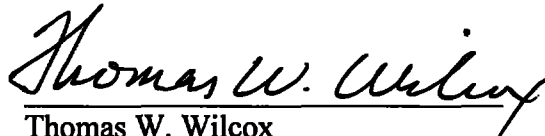
(1) after applying the Simplified Stand-Alone Cost approach of the *Simplified Standards*, find that the common carrier railroad rates UP has established in Tariff 4949, Item 1000-D for the transportation by rail of chlorine from Rowley, UT to Salt Lake City, UT, Sparks, NV, Elk Grove, CA, Stockton, CA, and Pittsburg, CA are unreasonable in violation of 49 U.S.C. §§ 10701(d)(1) and 10702;

(2) issue an order pursuant to 49 U.S.C. § 10704(a)(1) which prescribes just and reasonable rates and related rules and service terms applicable to UP's rail transportation of USM chlorine from Rowley, UT to the five destinations listed herein based on the evidence to be submitted in this proceeding;

(3) award USM reparations, plus any applicable interest, as calculated based on the record in this proceeding, in accordance with 49 U.S.C. § 11704 for the unlawful charges assessed by UP from and after March 3, 2009; and

(4) grant to USM such other and further relief as the Board may deem proper under the circumstances.

Respectfully submitted,



Thomas W. Wilcox

David K. Monroe

Jason M. Setty

GKG Law, P.C.

1054 Thirty-First Street, NW, Suite 200

Washington, DC 20007

Phone: 202.342.5248

Fax: 202.342.5219

*Attorneys for Complainant US Magnesium L.L.C.*

Dated: October 9, 2009

## **EXHIBIT A**



UP 4949

Item: 1000-D  
CHLORINE

CHANGE KEY: A-Add; C-Change; D-Decrease; I-Increase; and X-Expire

For billing purposes use the following rate authority: UP 4949-1000-D

| STCC/GROUP | STCC | DESCRIPTION             |
|------------|------|-------------------------|
| 2812815    |      | Chlorine Gas, Liquefied |

Prices are subject to Fuel surcharges.

## GENERAL APPLICATION RULES FOR ITEM 1000-D

1. Price applies in United States funds.
2. Applies in AAR Car Type T, tank cars.
3. Mileage allowance payment on private equipment will not apply.
4. Price is subject to Tariff UP 6007 (series), item 695 (series).
5. Applies in Customer/Shipper-owned or -leased equipment bearing private (non-railcarrier) reporting marks.
6. Does not apply in equipment owned, controlled or leased by TTX.

## APPLICATION AND RATES

| COLUMN                                | RATE APPLICATION RULES             |                     |
|---------------------------------------|------------------------------------|---------------------|
| 1.                                    | Rates are in U.S. dollars Per Car. |                     |
|                                       | Col 1<br>Rate                      | Route<br>Code/Group |
| STCC: 2812815 Chlorine Gas, Liquefied |                                    |                     |
| From: UT, ROWLEY                      |                                    |                     |
| To: AZ, ELOY                          | 13396.00                           | UP                  |
| AZ, PHOENIX                           | 11625.00                           | UP                  |
| AZ, SAHUARITA                         | 10410.00                           | UP                  |
| CA, COLTON                            | 8924.00                            | UP                  |
| CA, ELK GROVE                         | 7341.00                            | UP                  |
| CA, LOS ANGELES                       | 8924.00                            | UP                  |
| CA, MOJAVE                            | 9388.00                            | UP                  |
| CA, ONTARIO                           | 9394.00                            | UP                  |
| CA, PITTSBURG                         | 10504.00                           | UP                  |
| CA, SACRAMENTO                        | 7341.00                            | UP                  |
| CA, SAN JOSE                          | 8855.00                            | UP                  |
| CA, SANTA FE SPRINGS                  | 9073.00                            | UP                  |
| CA, SAUGUS                            | 9531.00                            | UP                  |
| CA, STOCKTON                          | 7679.00                            | UP                  |
| CA, SYLMAR                            | 9459.00                            | UP                  |
| CA, TORRANCE                          | 9336.00                            | UP                  |
| CO, DENVER                            | 6530.00                            | UP                  |
| IA, CAMANCHE                          | 10743.00                           | UP                  |
| IA, CEDAR RAPIDS                      | 12328.00                           | UP                  |
| ID, LEWISTON                          | 7675.00                            | UP                  |

Issued: July 30, 2009  
Effective: July 30, 2009

UP 4949

Page: 1 of 2  
Item: 1000-D  
Continued on next page

|                     | Conf<br>Rate | Route<br>Code/Group |
|---------------------|--------------|---------------------|
| IL, DUPO            | 9653.00      | UP                  |
| IN, EAST CHICAGO    | 10565.00     | UP                  |
| LA, ALLEMANIA       | A 12964.00   | UP                  |
| LA, PLAQUEMINE      | A 15084.00   | UP                  |
| MO, FESTUS          | 10333.00     | UP                  |
| MO, KANSAS CITY     | 9432.00      | UP                  |
| MO, ST LOUIS        | 11083.00     | UP                  |
| NE, OMAHA           | 9428.00      | UP                  |
| NV, HENDERSON       | 6423.00      | UP                  |
| NV, SPARKS          | 6034.00      | UP                  |
| OK, NOWATA          | 12027.00     | UP                  |
| TN, MEMPHIS         | 11542.00     | UP                  |
| TX, DALLAS          | A 11316.00   | UP                  |
| TX, HOUSTON         | 15629.00     | UP                  |
| UT, LITTLE MOUNTAIN | 2638.00      | UP                  |
| UT, SALT LAKE CITY  | 2579.00      | UP                  |

Issued: July 30, 2009  
Effective: July 30, 2009

UP 4949

Page: 2 of 2  
Item: 1000-D  
Concluded on this page



**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of October 2009, I served a copy of the foregoing Complaint by express overnight mail, upon the chief legal officer for Defendant at the following address:

General Counsel  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

  
Thomas W. Wilcox